Supreme Court, U.S.
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No.

In the Supreme Court of the United States

DEL BANJO,

Petitioner,

v.

ROBERT L. AYERS, JR., WARDEN,
SAN QUENTIN PRISON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Artuz v. Bennett*, 531 U.S. 4 (2000), this Court held that a state-court application for post-conviction review is "properly filed" for purposes of triggering the tolling provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) if it complies with a State's "conditions to filing," regardless of whether the application also complies with a State's "conditions to obtaining relief." Under California law, a habeas petitioner may file a second or successive petition to present new facts in support of earlier-filed claims when the petitioner has exercised "due diligence" in discovering the new facts. The questions presented are:

1. Did the Ninth Circuit err, in conflict with the Fifth Circuit and this Court's decision in *Artuz*, by treating California's "due diligence" requirement as a "condition to filing" rather than a "condition to obtaining relief"?

2. If California's "due diligence" requirement is a condition to filing, did the Ninth Circuit err, in accord with the Eighth Circuit but in conflict with the Eleventh, by refusing to require proof that such a condition was "firmly established" and "regularly followed" before it could be invoked to bar tolling under AEDPA?

3. If California's "due diligence" requirement is a condition to filing, does *Carey v. Saffold*, 536 U.S. 214 (2002), require federal habeas courts to give conclusive effect to a state court's lack-of-diligence finding, no matter how unreasonable that finding is in light of the evidence presented?

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Del Banjo respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-11a) is reported at 614 F.3d 964. The opinion of the district court (App. 12a-27a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 2010. On that same date, the court of

appeals extended the deadline to file a petition for rehearing or rehearing en banc to August 23, 2010. App. 39a. A timely petition for rehearing was denied on September 15, 2010. App. 40a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2244(d)(1) of Title 28 U.S.C. provides, in pertinent part: "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."

Section 2244(d)(2) of Title 28 U.S.C. provides: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

STATEMENT OF THE CASE

The Ninth Circuit held in the decision below that petitioner has forfeited any opportunity for federal-court review of his meritorious constitutional claims because his federal habeas petition was "untimely." The court of appeals reached that conclusion by treating California's "due diligence" requirement for successive petitions as a "condition to filing" rather than a "condition to obtaining relief"; applying that requirement in circumstances where its application was neither firmly established nor regularly followed; and abdicating its duty to review, even deferentially, the state court's lack-of-diligence finding. These rulings conflict with decisions of this Court and of other courts of appeals, and together effect a significant contraction of the availability of federal

habeas review in the Nation's largest circuit. Review is therefore warranted.

A. State Trial Court Proceedings

In July 2000, a Los Angeles jury convicted petitioner Del Banjo of two offenses arising from an alleged sexual assault in June 1997. The case posed a classic "he said, she said" contest: Banjo testified that he had consensual sex with the alleged victim as part of an act of prostitution; the alleged victim denied that she was a prostitute and testified that she had been sexually assaulted. There were no other third-party witnesses to what occurred, and thus the outcome of the trial turned entirely on the jury's assessment of the alleged victim's credibility versus that of Banjo.

At trial, the alleged victim of the assault, Nanna Skov (addressed as "Anne" or "Anna"), portrayed herself as a young and naïve visitor from Denmark who had recently arrived in the United States and was unfamiliar with big-city life. Skov testified that on the night of the alleged assault, she was walking alone on Sunset Boulevard in Hollywood around 1:00 or 1:30 a.m. after venturing out to call her mother in Denmark from a payphone near her apartment. R.T. 255.[1] Banjo pulled up in a blue Mercedes Benz convertible and asked if she wanted a ride home. R.T. 259. Although only a few blocks from her apartment at that point, on a well-lit and busy street, Skov testified that she jumped into the car of a complete stranger to accept a ride home because in

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[1] "R.T." refers to the reporter's transcript in *People v. Banjo*, Los Angeles County Superior Court Case No. BA198122, as submitted to the Court of Appeal of California, Second Appellate District, Case No. B147527.

Denmark people are trusting and accept rides from strangers all the time. R.T. 262, 310-11. According to Skov, instead of dropping her off at her apartment, Banjo drove her to a secluded area in the Hollywood Hills against her will and had forcible anal intercourse with her in the front passenger seat of his car. R.T. 282-83.

At the time of trial, Banjo was a single, 38-year-old executive vice president in charge of worldwide sales and distribution at a company that provided ticketing software for the cinema industry. R.T. 881-82. Born in England of African ancestry, he received undergraduate and masters degrees from the University of London and the London School of Economics, respectively, before moving to the United States in 1988. R.T. 881.

Banjo testified that he met Skov outside a strip club called "Crazy Girls" or "Girls-Girls-Girls" at Sunset and La Brea in Hollywood, where he was going to meet friends. R.T. 976, 978. Banjo had just parked his car when Skov approached him and commented, "Nice car." R.T. 977. Banjo assumed Skov was working as a prostitute (or an undercover policewoman) based on her attire – "short-shorts," a midriff-baring top, high-heeled sneakers – and the fact that the club was in an area known for prostitution activity. R.T. 977, 979. Skov asked him to drive her to a motel where she said she was staying, and on the way they discussed the services she was willing to perform and at what price. R.T. 979-81. At the motel they engaged in what Banjo believed to be consensual sex in exchange for money. R.T. 984, 994-95.

Afterward, because Banjo needed additional cash to pay Skov the full amount owed, Skov agreed to go

with him to a nearby bank. The A.T.M. machine at that bank was not working, but Skov did not believe Banjo when he returned to the car and told her this. R.T. 985-86, 1053-54. She became angry and refused his offer to drive to another bank, and asked him instead to drive her to an area in the Hollywood Hills where she hoped to find friends from whom she could buy drugs. R.T. 986-89. When they were unable to find Skov's friends, Banjo left her there and went home. R.T. 989-90.

During her testimony, Skov denied that she had asked Banjo to drive her to any location other than her apartment. R.T. 261, 319-20. She also denied that she had solicited Banjo for an act of prostitution, and in fact testified that she never had a job while living in Los Angeles. R.T. 298, 319.

The prosecution knew that Skov's portrayal of herself at trial – as a trusting and naïve visitor from Denmark who had innocently accepted a ride home from a stranger at 1:00 a.m. – was false.

First, the prosecution learned before trial that Skov was an adult-film actress who had appeared in a number of pornographic films. The prosecution moved to exclude any evidence of this, even though the evidence corroborated Banjo's anticipated trial testimony.[2] When the first-assigned judge indicated that he was inclined to admit the evidence, and to exclude one of three alleged incidents involving other women that the prosecution argued showed Banjo's

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[2] Banjo stated in a pre-trial proffer that when he and Skov first spoke outside the strip club she touted herself as a porn star, and later showed him a video of one of her sexually explicit films at the motel to induce him to pay for additional sex acts. R.T. 178-79.

supposed "propensity" to commit the charged offenses, the prosecution announced it could not proceed with the case. The prosecution then sought dismissal so that it could refile the same charges the very next day and get the case assigned to a new judge. The newly assigned judge, not bound by the first judge's indicated rulings, subsequently decided to admit the alleged "propensity" evidence and to exclude all evidence of Skov's appearance as an actress in adult films. R.T. 200-01. The judge ordered Banjo not to say anything, when testifying in his own defense, that would reveal Skov's work as an adult-film actress; failure to comply, the judge warned, would result in contempt sanctions and an instruction to the jury that no such evidence existed. R.T. 798-99, 847-48. As a result of his compliance with the court's instructions, Banjo was precluded from offering full testimony in his own behalf as to the events of the night in question.

Second, before trial the prosecution learned from Marc Tietler, a friend of Skov's living in San Diego and a producer of several of the adult films in which she appeared, that Skov had worked as a prostitute in Los Angeles after moving there in April 1997. Petition for Writ of Habeas Corpus, filed Dec. 30, 2003, Los Angeles County Superior Court Case No. BA198122 (hereafter "First Petition"), Exh. E at 2-3. Tietler had helped Skov move from San Diego to Los Angeles by arranging for her to stay with a friend of his in Hollywood, Salvatore Guletta. (Guletta would later figure prominently in the state habeas proceedings, discussed below.) Both Tietler and Guletta refused to cooperate with the defense, however, and neither was called as a witness at trial. Inexplicably, despite its import for the credibility contest that would ensue at trial, Banjo's trial

counsel failed to conduct any further investigation into whether Skov had worked as a prostitute, and later admitted he had no tactical reason for not pursuing such an investigation. *Id.* at 4.

Notwithstanding this evidence, which was flatly inconsistent with Skov's portrayal of herself at trial, the prosecution repeatedly vouched for Skov's credibility during closing arguments, urging the jury to "remember what you thought as Anne testified. Remember how credible she was.... Think of the details she gave you. Such credibility in all of her details." R.T. 1241. Addressing one of those "details" – Skov's assertion that she was walking on Sunset Boulevard at 1:00 a.m. to call her mother – the prosecution stated that, contrary to Banjo's testimony that Skov was working as a prostitute, "it turned out she had every reason to be there and a totally innocent explanation, as we know." R.T. 1236.

The jury found Banjo guilty of two offenses: forcible sodomy, based on Skov's testimony that Banjo sexually assaulted her; and kidnapping for a sexual purpose, based on Skov's testimony that Banjo drove her to an area in the Hollywood Hills against her will for the purpose of perpetrating the alleged assault. This latter testimony also led the jury to find true a special enhancement alleging that Skov had been kidnapped in connection with the sodomy offense and "the movement of the victim substantially increased the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense." Cal. Penal Code § 667.61(d)(2).

Although the forcible sodomy count was otherwise punishable by three to eight years of imprisonment (Cal. Penal Code § 286(c)(2)(A)), the jury's finding on the kidnapping enhancement mandated a sentence of

25 years to life (*id.* § 667.61(a)), which the court imposed. The court stayed the 11-year sentence imposed on the kidnapping count because that count was based on the same conduct underlying the kidnapping enhancement.

B. State Post-Conviction Proceedings

1. After denial of relief on direct appeal, Banjo's counsel pursued a diligent investigation of Skov's background, which produced evidence that she had in fact been working the streets of Hollywood as a prostitute – evidence that to this day the State has never contested. On December 30, 2003, Banjo filed a petition for habeas corpus in the state trial court asserting a due-process claim based on the prosecution's use of Skov's false testimony at trial, and a claim for ineffective assistance of counsel based on trial counsel's failure to investigate Skov's prostitution activities before trial began.

Banjo supported his petition with a declaration from Salvatore Guletta, who was now willing to come forward to tell what he knew. Guletta stated that when she lived with him in April 1997, and on regular occasions thereafter, Skov told him that she was supporting herself by working as a prostitute on the streets of Hollywood. First Petition, Exh. K at 1-2. Guletta stated that he had personally observed Skov pick up "Johns" at the corner of La Brea and Lanewood Avenue, just down the street from where he and Skov lived, and only a few blocks from the strip club where Banjo testified he encountered Skov. *Id.* at 2.

Banjo also supported his petition with a declaration from Betina Andersen, Skov's former roommate and close friend from Denmark. Andersen, who by then

had returned to Denmark, stated that after she and Skov moved into Guletta's apartment in Hollywood, Skov admitted that she had begun picking up men on the streets near their apartment and would sometimes "get into men's cars to do her business." First Petition, Exh. L at 2. Although Andersen initially told the defense investigator that Skov admitted earning money in exchange for sex, when Andersen signed her declaration she crossed out those words and asserted that she did not know if Skov charged for sex. *Id.* Andersen stated that Skov's conduct continued after the two moved into their own apartment, and that on occasion Skov would take the men she met on the streets to nearby motels. *Id.* at 3.

This new evidence was plainly material to the outcome at trial. *Cf. Kyles v. Whitley*, 514 U.S. 419, 435 (1995) (evidence material for *Brady* purposes if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict"). Learning that Skov worked as a prostitute would not, of course, have precluded the jury from finding that she was sexually assaulted on the night in question. But at a minimum it would have raised doubts about her account of the alleged assault (or her identification of the perpetrator), given the false account she gave of how her encounter with Banjo began. And proof that Skov was indeed working as a prostitute would have negated any basis for the jury to conclude that Skov had been "kidnapped" by Banjo when she drove with him to the location where they were to have sex. The jury's finding on the kidnapping enhancement resulted in Banjo receiving a sentence of 25 years to life instead of a maximum of eight years' imprisonment. He has

already been incarcerated for more than ten years serving the sentence imposed in this case.

Based on the new evidence provided by Guletta, the trial court granted an order to show cause and scheduled an evidentiary hearing. *See* Order on Petition for Habeas Corpus, Granting Order to Show Cause in Part, *People v. Banjo*, Los Angeles County Superior Court Case No. BA198122 (June 3, 2004).[3] Guletta was the principal witness at the hearing and testified to the matters set forth in his declaration. The State did not challenge the truthfulness of Guletta's testimony regarding Skov's prostitution activities.

On January 28, 2005, however, the court issued an order denying habeas relief on the ground that the court did not believe Guletta's testimony. App. 31a-34a. The court stated: "This order is based upon one central ground: I did not believe Salvatore Guletta and have no confidence in him or his testimony." *Id.* at 32a. On February 10, 2005, the court denied Banjo's request for reconsideration.

2. Given the court's stated basis for denying relief, Banjo's counsel redoubled their efforts to find additional witnesses who could corroborate Guletta's testimony. Through sheer luck and good detective work (discussed below), they located Sergio Mayorga, the former manager of the apartment building in which Skov and Andersen had lived eight years earlier, and two current tenants of the building who knew Skov and Andersen when they lived there.

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[3] Although Andersen's declaration left little to be inferred, the court disregarded it entirely because Andersen claimed not to know whether Skov received money for her favors. *Id.* at 2.

Mayorga signed a declaration stating that he observed a never-ending stream of men going to see Skov and Andersen at all hours of the day throughout their tenancy in the building. Second Petition for Writ of Habeas Corpus, filed July 6, 2005, Los Angeles County Superior Court Case No. BA198122 (hereafter "Second Petition"), Exh. P at 1. He received constant complaints from the tenant in a neighboring apartment about the loud noises (of a sexual nature) coming from Skov's and Andersen's apartment. *Id.* at 2. Mayorga almost always saw Skov dressed in revealing and suggestive clothing, and on two occasions late at night saw her dressed in that fashion walking slowly on sidewalks in areas where he had frequently seen women who appeared to be prostitutes working. *Id.* On one occasion when leaving the apartment building he observed Skov openly having sex with a man on the tailgate of a pickup truck in the parking area of the building. *Id.* Mayorga eventually evicted Skov and Andersen shortly after Skov suggested trading sex for all or part of the rent that was due. *Id.* at 3.

The two current tenants who knew Skov and Andersen provided further corroboration of Skov's involvement in prostitution. One of the tenants, Josh Merchant, stated in his declaration that he became acquainted with Skov and Andersen and frequently visited their apartment to use drugs with them. Second Petition, Exh. Q at 1. Merchant stated that both Skov and Andersen openly discussed that they were earning money as prostitutes, and on several occasions when visiting their apartment Merchant saw men hand money to Skov and proceed with her into the bedroom. *Id.* On more than one occasion, Skov asked Merchant to accompany her so that she would not be walking the streets alone, and on these

occasions he saw Skov get into cars with men for the purpose of having sex for money. *Id.* at 1-2. The other tenant, Bruce Derr, confirmed that he saw a constant stream of men whom he did not recognize as residents of the building going into and out of Skov's and Andersen's apartment, mainly late at night, and that whenever he saw Skov she was usually dressed in revealing clothing that suggested to him she was either a topless dancer or a prostitute. Second Petition, Exh. R at 1-2.

3. On July 6, 2005, less than five months after the denial of his first habeas petition, Banjo filed a second petition in the trial court that raised the same earlier-filed claims but supplemented the factual basis for those claims with the newly obtained declarations just discussed. California law permits the filing of a second or successive petition in these circumstances if the petition relies on new facts that could not in the exercise of due diligence have been discovered in time to present them in an earlier petition. *See In re Clark*, 855 P.2d 729, 748 (Cal. 1993); *In re Martin*, 744 P.2d 374, 390 n.3 (Cal. 1987).

Banjo's petition explained in detail the diligent efforts he had undertaken before filing his first petition to discover the existence of additional witnesses knowledgeable about Skov's prostitution activities. Second Petition at 8-15, 21-22, 36-38. For example, Banjo's defense investigator made five separate trips to the apartment building where Skov had lived in September and December 2002, as well as four additional trips to the building in January and August 2004. He called every apartment over the building's intercom system, but no tenant would speak to him or "buzz" him into the building. Second Petition, Exh. O at 1-2, 3-4. On multiple occasions,

the investigator also contacted the manager of the apartment building, the management company overseeing the building, and the building owner, but none of them would permit him access to the building or release any information about the building's past tenants. *Id.*

Banjo's second petition also explained how he had only recently been able to locate Mayorga, Merchant, and Derr. Although the present manager of the apartment building in which Skov used to live (Dave Cabert) had steadfastly refused to cooperate with the defense investigator, it turned out that Guletta knew him, and at Guletta's urging Cabert finally agreed to speak with the investigator. Second Petition, Exh. N at 1-2. Cabert was hired after Skov had moved out, but he remembered the name of his predecessor – Mayorga – and thought Mayorga may have moved to an area 70 miles north of Los Angeles. Second Petition, Exh. O at 5. Armed with this information, the defense investigator found Mayorga by combing through county property records and identifying the house Mayorga had recently purchased. *Id.* at 5-6. And Cabert, having now been contacted through Guletta, finally gave the defense investigator access to the building, which allowed him to locate and interview Merchant and Derr. *Id.* at 6-7.

On July 27, 2005, the trial court denied Banjo's second habeas petition. App. 35a-36a. The court stated that because Mayorga, Merchant, and Derr lived in the Southern California area, they were, in the court's view, "available for investigation, interview and testimony at all relevant times." App. 36a. (That, of course, was true of the 18 million other people who live in Southern California but did not explain why Banjo should have found these three

individuals sooner than he did.) Based on that observation alone, and without discussing Banjo's detailed explanation for not discovering the existence of these witnesses earlier, the court concluded that "with reasonable diligence Petitioner's current declarations could have been and should have been discovered and produced during the first habeas proceeding." *Id.* The court construed Banjo's second petition as a motion for new trial and declined to exercise its discretion to grant such relief. *Id.*

4. Banjo then filed a petition for habeas corpus in the California Court of Appeal on September 29, 2005, which the court denied without comment on April 11, 2006. App. 37a. Banjo filed a petition for habeas corpus in the California Supreme Court on May 18, 2006, which that court denied without comment on March 21, 2007. App. 38a.

C. Federal Habeas Proceedings

Having exhausted his state court remedies, Banjo turned to the federal courts for relief. He filed his first and only federal habeas petition under 28 U.S.C. § 2254 on April 2, 2007, asserting the same due-process and ineffective-assistance-of-counsel claims he had raised in state court. The district court never reviewed the merits of those claims because it held Banjo had filed his petition too late. App. 12a-27a.

The Ninth Circuit affirmed. App. 1a-11a. The court noted that AEDPA's 1-year statute of limitations began to run on January 15, 2003, the date Banjo's conviction became final, and that only 15 days of AEDPA's 1-year limitations period remained by the time Banjo filed his first state habeas petition on December 30, 2003. *Id.* at 6a-7a. The court held that, under AEDPA's tolling provision (28 U.S.C.

§ 2244(d)(2)), the limitations period remained tolled until the state habeas court denied Banjo's request for reconsideration on February 10, 2005. App. 7a. But the court held that Banjo's state habeas petition was no longer "pending" after that date because the less than 5-month, fully explained delay between the denial of relief on the first petition and the filing of Banjo's second petition rendered the second petition "untimely." *Id.* at 10a. The only support the court cited for its ruling was the state habeas court's finding that Banjo had not exercised due diligence in locating the three additional witnesses in time to include their declarations with his first petition. *Id.* The court of appeals made no attempt to review the detailed record Banjo submitted explaining why he had not been able to locate those witnesses earlier.

The state habeas court found that Banjo should have discovered the additional witnesses before filing his first petition – a finding that would have applied whether the delay in filing the second petition had been one day, one month, or one year. Thus, the state court's lack-of-diligence finding plainly related to a successiveness bar, not to a timeliness bar. That explains why, as the Ninth Circuit itself acknowledged, the state court did *not* reject Banjo's second petition as "untimely." App. 8a. The court of appeals conflated two entirely separate procedural bars – California's timely filing requirement for all petitions and its "due diligence" requirement for successive petitions – and improperly treated the latter requirement as a "condition to filing" for purposes of AEDPA's tolling provision.[4]

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[4] At the end of its opinion, the Ninth Circuit addressed Banjo's alternative argument that, even putting aside his second petition, the delay between denial of his first petition and the

REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit's Decision Treating California's Due Diligence Requirement As A Condition To Filing Directly Conflicts With *Artuz v. Bennett* And Creates A Circuit Split.

1. AEDPA establishes a 1-year limitations period for state prisoners seeking habeas review in federal court. 28 U.S.C. § 2244(d)(1). That period will usually begin to run on the date a prisoner's conviction becomes final. 28 U.S.C. § 2244(d)(1)(A). By establishing a fixed 1-year statute of limitations, Congress sought to respect the finality of state-court judgments by preventing prisoners from delaying the filing of their request for federal post-conviction review. *Carey v. Saffold*, 536 U.S. 214, 222 (2002). At the same time, however, Congress sought to "enable the exhaustion of available state remedies" before requiring state prisoners to file in federal court. *Artuz v. Bennett*, 531 U.S. 4, 10 (2000).

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filing of his Court of Appeal petition (a total of approximately seven months) was reasonable under California's timeliness standard. App. 11a. Most of that delay, of course, consisted of the nearly 5-month gap between denial of Banjo's first petition and the filing of his second petition. The State has never argued that the subsequent 2-month delay between denial of Banjo's second petition and the filing of his petition in the Court of Appeal was unreasonable, or that the 5-week delay between the Court of Appeal's ruling and the filing of Banjo's petition in the California Supreme Court was unreasonable. Thus, if Banjo's second petition was timely, as argued here, his state habeas proceedings remained "pending" from the date he filed his first petition until the California Supreme Court denied relief on March 21, 2007. Banjo filed his federal habeas petition just 12 days later, within the 15 days he had remaining under AEDPA's one-year limitations period.

Accordingly, AEDPA includes a tolling provision that suspends the running of the federal limitations period for "[t]he time during which a properly filed application for State post-conviction review ... is pending." 28 U.S.C. § 2244(d)(2). The objective of this provision, the Court has emphasized, is "to give States the opportunity to complete one full round of review, free of federal interference." *Saffold*, 536 U.S. at 222.

To trigger tolling, a state-court application must be both "properly filed" and "pending." The Court interpreted the meaning of "properly filed" in *Artuz*, *supra*. There, the Court held that an application is properly filed if "its delivery and acceptance are in compliance with applicable laws and rules governing filings." 531 U.S. at 8. The Court gave as examples rules prescribing "the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee." *Id.* The Court distinguished these "condition[s] to filing" from "condition[s] to obtaining relief," such as state procedural bars precluding relief on claims that were previously decided on the merits or those that could have been raised on direct appeal but were not. *Id.* at 10-11. Only the failure to comply with conditions to filing, the Court concluded, will render an application improperly filed for purposes of AEDPA's tolling provision.

The Court addressed the meaning of "pending" in *Saffold*, *supra*. The question there was whether an application remains "pending" for purposes of AEDPA's tolling provision during the interval between the denial of relief by a lower court and the filing of a notice of appeal (or its equivalent) in a higher court. The Court held that an application

remains "pending" during that interval, provided that the filing in the higher court complies with the State's timeliness rules. 536 U.S. at 220-21, 225; *see Evans v. Chavis*, 546 U.S. 189, 191 (2006). That rule, the Court reasoned, was supported by the ordinary meaning of the word "pending," which in this context dictates that an application "is pending as long as the ordinary state collateral review process is 'in continuance' – *i.e.*, 'until the completion of' that process." 536 U.S. at 219-20.

The Court in *Saffold* then addressed whether the specific filing at issue – Saffold's petition in the California Supreme Court – was timely. Under California's unique system of collateral review, a state habeas petitioner seeks appellate review of a lower court's decision by filing a new original habeas petition in the appellate court, rather than a notice of appeal. *Saffold*, 536 U.S. at 221. No fixed deadline sets the time limit within which the new petition must be filed; it is timely if filed within a "reasonable" time. *Id.* Saffold had filed his habeas petition in the California Supreme Court 4½ months after the California Court of Appeal denied relief, but the Court held that a delay of that length could not be deemed *per se* unreasonable under California law. *Id.* at 226. The Court remanded for the Ninth Circuit to resolve the issue of timeliness in the first instance.[5]

2. The Ninth Circuit held that Banjo's state-court application was no longer "pending" for tolling

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[5] On remand, the Ninth Circuit held that the 4½-month delay was reasonable under California law and that Saffold's petition was therefore timely, citing cases in which the California Supreme Court reached the merits of petitions notwithstanding far longer delays of 7 months, 9 months, and 18 months. *Saffold v. Carey*, 312 F.3d 1031, 1035 (9th Cir. 2002).

purposes after the trial court denied relief on his first petition because the second petition he filed was "untimely." App. 9a-10a. But the Court did not ground its holding on cases applying California's timely filing requirement, nor could it have. Banjo filed his second petition less than five months after denial of the first petition, barely more than the 4½-month delay at issue in *Saffold* (which this Court held could not be deemed *per se* unreasonable), and considerably shorter than the delays deemed reasonable by the California Supreme Court in prior cases. *See supra* n.5. Indeed, the delay between the discovery of the "relevant triggering facts" (*In re Robbins*, 959 P.2d 311, 328 (Cal. 1998)) in late March 2005 – namely, the existence of Mayorga – and the filing of the second petition in July 2005 was even shorter than five months. And unlike in *Evans v. Chavis*, *supra*, which rejected as unreasonable a "totally unexplained, hence unjustified" delay of six months (546 U.S. at 201), the less than 5-month delay at issue here was fully explained by the vigorous investigation Banjo's counsel conducted during that period in an effort to locate additional witnesses who could corroborate Guletta's testimony.

The only basis the Ninth Circuit cited for its determination that Banjo's second petition was untimely (and hence not "properly filed") was the state habeas court's finding that the testimony of Banjo's newly discovered witnesses " 'could have been and should have been presented during the extensive proceedings on the first habeas petition.' " App. 3a; *see id.* at 10a. But that finding (wholly unsupported in its own right) was a determination that Banjo had failed to comply with a state procedural bar – California's "due diligence" requirement for successive petitions – not a finding that he failed to

comply with the State's timeliness requirement for petitions generally. That explains why, as the Ninth Circuit itself acknowledged, the state habeas court "did *not* make a determination that Banjo's second petition was untimely." App. 8a (emphasis added).[6]

In short, Banjo's alleged failure to comply with California's "due diligence" requirement could at most be deemed a failure to comply with a "condition to obtaining relief" (*Artuz*, 531 U.S. at 11), and should have had no effect on the determination of whether Banjo's application for state post-conviction review remained "pending" for purposes of AEDPA's tolling provision.

3. The Ninth Circuit's contrary conclusion is in direct conflict with this Court's decision in *Artuz*. One of the New York procedural bars invoked by the State in that case was "a bar against raising a claim that was available on direct appeal but was not raised because of the defendant's 'unjustifiable failure.'" *Artuz*, 531 U.S. at 7. That rule is no different from California's "due diligence" requirement – both rest on the notion that the petitioner had an opportunity to raise the claim at issue in earlier proceedings but unjustifiably failed to do so. This Court expressly held that the state procedural bar in *Artuz* was a "condition to obtaining relief," not a "condition to filing," and thus failure to comply with it did not render the petition improperly

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[6] The State conceded at oral argument in *Walker v. Martin* that California's timeliness and successiveness bars are distinct. Tr. of Oral Arg. 11. The Ninth Circuit had earlier reached the same conclusion, in a decision that squarely conflicts with the decision below. *See Ramirez v. Yates*, 571 F.3d 993, 999 (9th Cir. 2009) (distinguishing between California's timeliness and "due diligence" requirements).

filed for purposes of AEDPA's tolling provision. *Id.* at 10-11.

The decision below also conflicts with the Fifth Circuit's decision in *Villegas v. Johnson*, 184 F.3d 467 (5th Cir. 1999), which involved a Texas statute governing successive petitions virtually identical to California's common-law "due diligence" requirement. There, Villegas filed a second state habeas petition nine months after his first petition was denied. The state trial court denied the second petition on the ground that it was successive under Texas Code of Criminal Procedure article 11.04, which prohibits granting relief on claims raised in a successive petition unless the petitioner establishes that the factual basis for the claims "was not ascertainable through the exercise of reasonable diligence" at the time an earlier petition was filed. *Id.* at 468.[7] Based

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[7] Article 11.07, § 4 provides in relevant part as follows:

> Sec. 4. (a) If a subsequent application for writ of habeas corpus is filed after final disposition of an initial application challenging the same conviction, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> (1) the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
>
> . . . . .
>
> (c) For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

Tex. Code Crim. Proc., art. 11.07, § 4.

on that ruling, the federal district court dismissed Villegas's federal habeas petition as untimely, concluding that "Villegas's successive state application had not been 'properly filed' as that term is used in § 2244(d)(2) and that, as a consequence, its pendency had not tolled the limitation period." *Id.*

The Fifth Circuit reversed. The court noted that, unlike in capital cases, for which Texas has established a fixed time limit on the filing of successive petitions, in non-capital cases Texas "places no absolute time or numerosity limitations on the filing of applications for a writ of habeas corpus." 184 F.3d at 471. Rather than impose filing limitations on successive petitions, Texas (like California) has chosen instead to curtail consideration of the merits of such petitions, allowing relief to be granted only in limited circumstances (those specified in article 11.07, § 4). *Id.* at 471-72. The court thus viewed article 11.07, § 4 as "a limitation on a Texas state court's ability to grant relief for a successive petition, as opposed to an absolute bar to the *filing* of such a petition." *Id.* at 472 n.4. On that basis (and anticipating this Court's subsequent decision in *Artuz*), the Fifth Circuit held that "Villegas's second petition, although dismissed as successive, was properly filed and thus tolled the applicable limitation period." *Id.* at 470.

The Ninth Circuit's decision in this case squarely conflicts with *Villegas*. California's "due diligence" requirement – which the court of appeals relied on as the sole basis for its holding that Banjo's second petition was untimely and hence not "properly filed" – is indistinguishable from the requirement under Texas law that a petitioner establish that the factual basis for a claim presented in a successive petition

"was not ascertainable through the exercise of reasonable diligence" at the time an earlier petition was filed. Texas Code Crim. Proc. art. 11.07, § 4(c). Such requirements, which relate to the circumstances under which relief may be granted, plainly constitute conditions to obtaining relief rather than conditions to filing. The Ninth Circuit erred by treating California's "due diligence" requirement as a condition to filing and holding that Banjo was not entitled to tolling under AEDPA due to his alleged failure to comply with that requirement.

B. Review Is Also Warranted To Resolve A Circuit Split On Whether Conditions To Filing Must Be "Firmly Established" And "Regularly Followed" Before They May Be Invoked To Preclude Tolling Under AEDPA.

Even if the Ninth Circuit correctly construed California's "due diligence" requirement as a timeliness rule – and thus a condition to filing – the question remains whether such a condition must be "firmly established" and "regularly followed" before it may be invoked to preclude tolling under AEDPA. The circuits are divided on this question as well.

1. Federal habeas review may be barred by a procedural default in state court only if the state procedural rule constitutes an independent and adequate ground for decision. *Lee v. Kemna*, 534 U.S. 362, 375 (2002). To be "adequate," a state procedural default rule must be " 'firmly established and regularly followed' " at the time of the alleged default. *Id.* at 376 (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984)). That standard is drawn from this Court's precedents governing direct review of state-

court decisions denying relief on federal constitutional claims. In those cases the Court has emphasized that " '[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justifiable reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.' " *Ford v. Georgia*, 498 U.S. 411, 423 (1991) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958)).

The Court has not previously decided whether procedural default standards apply when noncompliance with a state "condition to filing" is invoked to bar federal habeas review under AEDPA's statute of limitations. In the wake of *Artuz*, the Court has addressed only what types of state procedural rules qualify as "conditions to filing" as opposed to "conditions to obtaining relief." For example, in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), the Court held that state timeliness rules should be regarded as conditions to filing (rather than ordinary procedural bars) regardless of whether they contain discretionary exceptions that judges must apply on a case-by-case basis. And in *Allen v. Siebert*, 552 U.S. 3 (2007) (*per curiam*), the Court held that a state timeliness rule constitutes a condition to filing whether the prescribed statute of limitations is regarded under state law as a jurisdictional bar or an affirmative defense that may be waived. The Court reiterated "that time limits, *no matter their form*, are 'filing' conditions, and that a state post-conviction petition is therefore not 'properly filed' if it was rejected by the state court as untimely." *Id.* at 6.

While *Pace* and *Allen* determined that state timely filing requirements are conditions to filing even if

they prescribe an indeterminate and flexible time limit that may be waived, those cases did not address what degree of clarity such timeliness rules must exhibit before they may be invoked to bar tolling (and, as a consequence, all federal review of a state prisoner's constitutional claims). There is a 2-to-1 circuit split on this issue.

Banjo argued below that California's timeliness bar could not be invoked to render his second petition improperly filed (and hence ineligible for tolling) absent a showing that the bar was firmly established and regularly followed. *See* CA9 AOB 42-43, 48; CA9 PFR 17-18. But the court of appeals refused to require any such showing here, having previously rejected the argument. *See Zepeda v. Walker*, 581 F.3d 1013, 1018 (9th Cir. 2009) ("whether a condition to filing is firmly established and regularly followed is irrelevant"); *see also White v. Martel*, 601 F.3d 882, 884 (9th Cir. 2010). In so holding, the Ninth Circuit has aligned itself with the Eighth Circuit, which also has held that a condition to filing need not be firmly established or regularly followed before it may be invoked to bar federal habeas review under AEDPA's statute of limitations. *See Nelson v. Norris*, 618 F.3d 886, 892 (8th Cir. 2010) ("if a state court finds that a motion fails to comply with filing requirements, that motion is not 'properly filed,' regardless of whether those filing requirements are firmly established and regularly followed"); *Walker v. Norris*, 436 F.3d 1026, 1031 (8th Cir. 2006).

The Eleventh Circuit, however, reached the opposite conclusion in *Siebert v. Campbell*, 334 F.3d 1018 (11th Cir. 2003) (*per curiam*). There, the court noted that, under state procedural default doctrine, "only rules that are 'firmly established and regularly

followed' qualify as adequate state grounds for precluding substantive review of federal claims." *Id.* at 1025 (citing *Edwards v. Carpenter*, 529 U.S. 446, 450 (2000), and *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991)). In deciding whether that standard applies to state procedural rules in the "properly filed" inquiry under AEDPA, the court reasoned that "[t]he aims of comity and federalism that animate both AEDPA and the doctrine of procedural default favor deference toward state procedural rules only when their consistent application demonstrates the state's real reliance on them as a means to the orderly administration of justice." *Id.* Accordingly, the court held that state rules imposing conditions to filing "must be 'firmly established and regularly followed' before noncompliance will render a petition improperly filed for the purpose of AEDPA's tolling provision." *Id.*[8]

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[8] This aspect of the Eleventh Circuit's decision was unaffected by the Court's ruling in *Allen v. Siebert*, 552 U.S. 3 (2007) (*per curiam*), which summarily reversed a different Eleventh Circuit decision related to the same case. In the decision discussed in text, the Eleventh Circuit held that the jurisdictional character of Alabama's timeliness requirement was not firmly established and regularly followed during the relevant time period, and that Alabama's statute of limitations was thus merely an affirmative defense that could be waived. 334 F.3d at 1025. In *Allen*, this Court subsequently held that, even if deemed an affirmative defense rather than a jurisdictional bar, Alabama's statute of limitations constitutes a condition to filing, and that Siebert's failure to comply with it meant that his state-court petition had not been "properly filed." 552 U.S. at 6. The Eleventh Circuit continues to follow *Siebert*'s holding on the issue relevant here. *See, e.g., Delguidice v. Florida Dep't of Corrections*, 351 Fed. Appx. 425, 427 (11th Cir. 2009) (*per curiam*); *Van Zant v. Florida Parole Comm'n*, 308 Fed. Appx. 332, 335 (11th Cir. 2009) (*per curiam*).

2. The Ninth Circuit erred in aligning itself with the Eighth Circuit on this issue rather than the Eleventh, as the facts of this case graphically illustrate. After the state habeas court denied relief on the first petition, Banjo's habeas counsel – some of the most experienced lawyers in the State – could have pursued one of two options: They could seek immediate appellate review based on the existing factual record; or they could attempt to strengthen the factual record by continuing their investigation, the course they ultimately chose given the stated ground on which the state habeas court had denied relief (lack of confidence in Guletta's testimony). In choosing that latter option, Banjo's counsel relied on well-settled California precedent establishing that a delay of less than five months to pursue a bona fide investigation into the factual basis for claims is not deemed unreasonable under California law. *See, e.g.*, *Robbins*, 959 P.2d at 328 (5-month delay); *In re Huddleston*, 458 P.2d 507, 508 (Cal. 1969) (2½-year delay); *In re Nunez*, 93 Cal. Rptr. 3d 242, 253 (Ct. App. 2009) (6-month delay). To the extent Banjo was required to provide an explanation for that delay, he provided a detailed account of every step in the investigation that occurred during the time period at issue, including an explanation for why earlier efforts to locate the new witnesses had not proved fruitful. In no case found by Banjo's counsel was a fully explained delay of less than five months deemed unreasonable.[9]

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[9] Indeed, the State conceded at oral argument in *Walker v. Martin*, No. 09-996 (argued Nov. 29, 2010), that a 5-month delay between discovery of the relevant triggering facts and presentation of the claims is reasonable. Tr. of Oral Arg. 12-13.

In addition, although Banjo could have presented the newly obtained declarations in an original petition filed in the state Court of Appeal, state law permitted him to file a second petition in the state trial court instead. *See Martin*, 744 P.2d at 390 n.3. Filing in the trial court was the most expeditious way to proceed here because California appellate courts confronting a petition with potentially meritorious claims that turn on contested factual issues will remand to the trial court for an evidentiary hearing. *See People v. Romero*, 883 P.2d 388, 393 (Cal. 1994); *In re Hochberg*, 471 P.2d 1, 3-4 & n.2 (Cal. 1970).

Thus, in filing his second petition in the trial court less than five months after the denial of relief on his first petition, Banjo acted "in justifiable reliance upon prior decisions." *Ford*, 498 U.S. at 423 (internal quotation marks omitted). Yet, without citing any contrary precedent that should have guided the actions of Banjo's counsel, the Ninth Circuit held that an alleged lack of diligence in discovering the existence of Mayorga, Merchant, and Derr rendered the second petition "not timely." App. 10a-11a. Banjo had no notice that his alleged failure to exercise due diligence in discovering the existence of additional witnesses before filing his first petition would be deemed to render his second petition *untimely*. This Court has previously refused to find a state procedural default rule adequate where, among other things, there were no published decisions applying the rule to bar relief in the circumstances presented. *Lee*, 534 U.S. at 382. Here, the Ninth Circuit turned that standard on its head by ignoring published decisions *allowing* relief in circumstances indistinguishable from those present in this case.

The Ninth Circuit's error in applying California's timeliness rule to bar federal-court review here is especially troublesome because it has resulted in the dismissal of Banjo's first and only federal habeas petition. As this Court has observed in another context, "[d]ismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996). Given the importance of a first federal habeas petition, the Court has stressed that "it is particularly important that any rule that would deprive inmates of all access to the writ should be both clear and fair." *Id.* at 330. The California timeliness rule that the Ninth Circuit invoked against Banjo had the effect of denying him all access to the writ, but its application to a 5-month, fully explained delay was neither clear nor fair.

The issue raised in this case complements the issue the Court is considering this Term in *Walker v. Martin*, No. 09-996 (argued Nov. 29, 2010), which raises the question whether California's timeliness requirement is "firmly established" and "regularly followed" in the context of a 5-year, totally unexplained delay. Granting review in this case will allow the Court to provide further guidance to the Ninth Circuit as it struggles to apply California's notoriously vague timeliness standard in the hundreds of federal habeas cases it reviews each year from California. *See Chavis*, 546 U.S. at 198. This Court itself has suggested that further clarification by the State would be beneficial for all concerned (*id.* at 199), but the Ninth Circuit's efforts to solicit such clarification have been rebuffed. *See Chaffer v. Prosper*, 592 F.3d 1046, 1048 n.1 (9th Cir. 2010)

(noting California Supreme Court's refusal to address Ninth Circuit's certified questions). In the absence of clear guidance, Ninth Circuit panels continue to reach wildly divergent results on timeliness issues with no apparent rhyme or reason. Compare the decision below with *Maxwell v. Roe*, __ F.3d __, 2010 WL 4925429 at *4-7 (9th Cir. Nov. 30, 2010) (holding 14-month delay reasonable). At this point, further intervention by this Court is not only warranted but essential to bring greater clarity to the circumstances in which California's indeterminate timeliness standard may be invoked under AEDPA to bar state prisoners from obtaining access to the writ.

C. The Ninth Circuit Misread *Saffold* As Imposing An Irrebuttable Presumption Of Correctness For State-Court Findings Of Lack Of Diligence.

As discussed above, in direct conflict with *Artuz*, the Ninth Circuit erroneously treated the state habeas court's lack-of-diligence finding as governing the issue of timeliness, even though that finding plainly related to a separate successiveness bar (a "condition to obtaining relief"). But even if the Ninth Circuit's analysis on that point were correct, the court of appeals still erred by giving conclusive effect to the state court's finding, without determining whether that finding was reasonable in light of the evidence presented.

To be sure, this Court has suggested that a state court's finding of untimeliness is binding on federal courts. *See Saffold*, 536 U.S. at 226 ("If the California Supreme Court had clearly ruled that Saffold's 4½-month delay was 'unreasonable,' that would be the end of the matter ...."). But while

federal courts undoubtedly should defer to state-court determinations that a petition was untimely under state law, when the matter turns on a disputed issue of fact, different considerations necessarily apply. The Court in *Saffold* surely did not intend to suggest that a state court's finding of lack of diligence – no matter how unreasonable in light of the evidence presented – must be given conclusive effect, even when doing so will deprive a state prisoner of all access to the writ. Any such reasoning would be flatly inconsistent with the Court's treatment of other state procedural-bar findings, whose adequacy to bar access to the writ is subject to independent federal review. *See Cone v. Bell*, 129 S. Ct. 1769, 1782 (2009) (federal courts have "an independent duty to scrutinize the application of state rules that bar our review of federal claims"); *Lee*, 534 U.S. at 375 (adequacy of state procedural bars to preclude federal review "is not within the State's prerogative finally to decide; rather, adequacy 'is itself a federal question' ") (quoting *Douglas v. Alabama*, 380 U.S. 415, 422 (1965)). Indeed, even when state courts address the merits of federal constitutional claims, their factual findings are not placed beyond review. *See* 28 U.S.C. § 2254(d)(2) (state-court decision not binding if based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding").

In the decision below, however, the Ninth Circuit read *Saffold*'s suggestion far more expansively. The court of appeals treated the state habeas court's lack-of-diligence finding as conclusive on the issue of timeliness, even though that finding lacked any support in the evidentiary record and had the effect of depriving Banjo of federal-court review altogether. Without conducting any analysis of the basis for the

state court's finding, the court of appeals simply noted that the state court had found lack of diligence and declared that finding determinative of the timeliness issue. App. 10a-11a.

Had California's "due diligence" requirement been treated as an ordinary procedural bar, as it should have been, Banjo would have been able to show that the state court's lack-of-diligence finding cannot be sustained even under AEDPA's deferential standard of review. *See* 28 U.S.C. § 2254(e)(1). But by expansively interpreting the scope of timeliness requirements to encompass that finding, and misreading this Court's decision in *Saffold*, the Ninth Circuit precluded *any* federal review – however deferential – of the correctness of the state court's determination that Banjo failed to exercise reasonable diligence. This case well illustrates the Tenth Circuit's warning that, if state habeas petitions dismissed on the basis of ordinary procedural bars were deemed "improperly filed" under AEDPA, many prisoners "would never have the opportunity to have a federal court review the state's finding of procedural bar," because their federal petitions would be rendered untimely in the absence of tolling. *Habteselassie v. Novak*, 209 F.3d 1208, 1212 n.5 (10th Cir. 2000); *cf. Hughes v. Irvin*, 967 F. Supp. 775, 779 (E.D.N.Y. 1997) ("The writ of habeas corpus would be emasculated if the factual determination of a state court could preclude a petitioner's access to federal court to challenge that very finding.").

The decision below highlights the grave threat to federal habeas review posed by an expansive interpretation of "conditions to filing" coupled with a refusal to engage in any scrutiny of the evidentiary support for underlying state-court findings. The

Ninth Circuit's decision, which has precluded a man sentenced to 25 years to life on the basis of indisputably false testimony from obtaining any federal review of his meritorious constitutional claims, warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 2010

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED JUNE 17, 2010

No. 08-56512

DEL BANJO,

Petitioner-Appellant,

v.

ROBERT L. AYERS, JR., WARDEN, SAN QUENTIN PRISON,

Respondent-Appellee.

June 17, 2010

Before: Diarmuid F. O'Scannlain and Richard C. Tallman, Circuit Judges, and Frederic Block, District Judge.*

TALLMAN, Circuit Judge:

Petitioner-Appellant Del Banjo, a California prisoner, appeals an order dismissing his federal habeas corpus petition as untimely pursuant to 28 U.S.C. § 2244(d). The district court determined that Banjo's state court petition for habeas corpus was no longer "pending" during the five-month period between the dismissal of his original petition in the Los Angeles County Superior Court and the filing of a

* The Honorable Frederic Block, Senior United States District Judge for the Eastern District of New York, sitting by designation.

successive petition in the same court, resulting in the expiration of his time to bring a federal habeas petition. Banjo argues that, pursuant to California law, his successive petition was timely, because the fact that he was seeking new evidence to support his claims explained and justified the delay. Thus, he contends that the federal habeas statute of limitation should toll. We disagree, and affirm the district court.

I

On July 13, 2000, Banjo was convicted by a Los Angeles County jury of one count of kidnapping with the intent to commit rape and/or sodomy and one count of sodomy. He was sentenced to prison for twenty-five years to life on January 8, 2001. He appealed to the California Court of Appeal and California Supreme Court without success.

Banjo then began his state habeas proceedings. On December 30, 2003, he filed his first petition in the Los Angeles County Superior Court, requesting relief on three grounds. The superior court issued an order to show cause on one claim, denying relief on the others. The court ultimately held an evidentiary hearing on Banjo's claim, but denied the petition on January 28, 2005, after finding Banjo's key witness not credible. On February 10, 2005, Banjo's motion to reconsider was likewise denied.

Almost five months later, on July 6, 2005, Banjo filed a second petition for a writ of habeas corpus in the Los Angeles County Superior Court. In this petition, Banjo brought the same three claims he had alleged in the first petition, but appended declarations from five new witnesses. The declarations were offered to corroborate the evidence

and independently establish the factual allegations that Banjo had raised at the first hearing.

The court denied Banjo's second petition on July 27, 2005, in part because Banjo failed to exercise due diligence in locating the new witnesses. The court observed that the petition "relie[d] upon declaration[s] by people who live in the Southern California area and have been available for investigation, interview and testimony at all relevant times. These are matters that could have been and should have been presented during the extensive proceedings on the first habeas petition."

Banjo next filed a habeas petition in the California Court of Appeal on September 29, 2005. On April 11, 2006, the court denied that petition without comment. Banjo then filed his last state habeas petition on May 18, 2006, before the California Supreme Court. That petition was summarily denied on March 21, 2007.

Banjo then moved to federal court. He filed a petition for a writ of habeas corpus in the Central District of California on April 2, 2007. California's motion to dismiss the federal petition as untimely was granted. This appeal timely followed.

II

The sole issue on appeal is whether the district court erred in determining Banjo's petition was untimely. We review that question de novo. *Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999). Banjo bears the burden of proving that the statute of limitation was tolled. *Smith v. Duncan*, 297 F.3d 809, 814 (9th Cir. 2002), *abrogated on other grounds by Pace v. DiGuglielmo*, 544 U.S. 408 (2005). We have

jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253(c), and we affirm.

III

A

[1] The Antiterrorism and Effective Death Penalty Act of 1996 sets a one-year statute of limitation on habeas corpus petitions filed by state prisoners. 28 U.S.C. § 2244(d); *Evans v. Chavis*, 546 U.S. 189, 191 (2006); *Waldrip v. Hall*, 548 F.3d 729, 734 (9th Cir. 2008). The one-year period begins to run when the state prisoner's conviction becomes final.[1] 28 U.S.C. § 2244(d)(1)(A). This one-year limitation period tolls, however, while the prisoner's "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2).

[2] Post-conviction review is "pending," and thus the statute of limitation tolls, while a prisoner is pursuing a full round of habeas relief in the state court. *Carey v. Saffold*, 536 U.S. 214, 219-21 (2002); *Delhomme v. Ramirez*, 340 F.3d 817, 819-20 (9th Cir. 2003), *abrogated on other grounds by Chavis*, 546 U.S. 189. The period in which a habeas petition is pending includes the time between a lower court's adverse ruling and the prisoner's filing of a notice of appeal, so long as the filing comports with state law timeliness requirements. *Chavis*, 546 U.S. at 191. An untimely petition, however, is not "properly filed" pursuant to 28 U.S.C. § 2244(d)(2), and so it does not

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[1] While there are other triggers for starting the running of the statute of limitation, 28 U.S.C. § 2244(d)(1)(B)-(D), none is relevant here.

toll the statute of limitation. *Pace*, 544 U.S. at 410; *Thorson v. Palmer*, 479 F.3d 643, 645 (9th Cir. 2007).

[3] Under California's unusual system of independent collateral review, a prisoner seeks review of a lower court's denial of relief by filing an original petition for habeas corpus in the reviewing court. *Chavis*, 546 U.S. at 192-93; *Waldrip*, 548 F.3d at 734. The period between a California lower court's denial of review and the filing of an original petition in a higher court is tolled—because it is part of a single round of habeas relief—so long as the filing is timely under California law. *Chavis*, 546 U.S. at 191-93; *Waldrip*, 548 F.3d at 734.

[4] A California petition is timely filed if it is filed within a "reasonable time." *Chavis*, 546 U.S. at 192-93; *Waldrip*, 548 F.3d at 734. California has not provided guidance as to what constitutes a "reasonable time." *Chavis*, 546 U.S. at 198; *Waldrip*, 548 F.3d at 734. In the absence of clear direction from the California courts, either in a particular case or in general, we must determine whether the petition at issue was filed within a "reasonable time." *Chavis*, 546 U.S. at 198. We cannot infer from a decision on the merits, or a decision without explanation, that the California court concluded that the petition was timely. *Id.* at 194 (citing *Saffold*, 536 U.S. at 225-26). A California court's determination that a filing was untimely, however, is dispositive. *Saffold*, 536 U.S. at 226 ("If the California Supreme Court had clearly ruled that Saffold's 4½-month delay was 'unreasonable,' that would be the end of the matter . . . .").

[5] Only the time period during which a round of habeas review is pending tolls the statute of

limitation; periods between different rounds of collateral attack are not tolled. *Biggs v. Duncan,* 339 F.3d 1045, 1048 (9th Cir. 2003). We employ a two-part test to determine whether the period between the denial of one petition and the filing of a second petition should be tolled. *Hemmerle v. Schriro,* 495 F.3d 1069, 1075 (9th Cir. 2007); *King v. Roe,* 340 F.3d 821, 823 (9th Cir. 2003), *abrogated on other grounds by Chavis,* 546 U.S. 189. "First, we ask whether the petitioner's subsequent petitions are limited to an elaboration of the facts relating to the claims in the first petition." *King,* 340 F.3d at 823. If the petitions are not related, then the subsequent petition constitutes a new round of collateral attack, and the time between them is not tolled. *Hemmerle,* 495 F.3d at 1075; *King,* 340 F.3d at 823. If the successive petition was attempting to correct deficiencies of a prior petition, however, then the prisoner is still making "proper use of state court procedures," and habeas review is still pending. *King,* 340 F.3d at 823 (quoting *Nino v. Galaza,* 183 F.3d 1003, 1006 (9th Cir. 1999)); *Hemmerle,* 495 F.3d at 1075. Second, if the successive petition was not timely filed, the period between the petitions is not tolled. *Hemmerle,* 495 F.3d at 1075; *King,* 340 F.3d at 823.

B

[6] Banjo's conviction was affirmed by the California Court of Appeal, and the California Supreme Court denied review on October 16, 2002. Because Banjo did not petition for certiorari, his conviction became final ninety days later, on January 14, 2003. Sup. Ct. R. 13; *Brambles v. Duncan,* 412 F.3d 1066, 1069 (9th Cir. 2005) (citing *Bowen v. Roe,* 188 F.3d 1157, 1158-59 (9th Cir. 1999)). Banjo did not file a federal petition for a writ of habeas corpus

pursuant to 28 U.S.C. § 2254 until April 2, 2007, more than four years later. Accordingly, absent statutory tolling under 28 U.S.C. § 2244(d)(2), Banjo's petition was untimely.

On December 30, 2003, Banjo filed his first petition for a writ of habeas corpus in Los Angeles County Superior Court. At that point, he had used 350 days of his one-year federal time limit to file a petition in district court. That petition was denied on January 28, 2005, after the superior court found Banjo's witness in support of his claim not credible. Banjo filed a motion for reconsideration on February 4, 2005, which was denied six days later on February 10. One hundred forty-six days later, on July 6, 2005, Banjo filed a successive petition in the superior court, raising the same claims as his first petition, but attaching what he claimed was newly discovered evidence. The superior court denied the petition on July 27, 2005. Sixty-four days later, on September 29, 2005, Banjo filed an original habeas corpus petition in the California Court of Appeal, again alleging the same claims; it was denied on April 11, 2006. On May 18, 2006, Banjo filed another original habeas corpus petition, again alleging the same claims, this time in the California Supreme Court, which denied relief on March 21, 2007.

As the district court concluded, "[i]t is clear that the statute of limitations was tolled from the filing of the First Superior Court Petition until the motion for reconsideration was denied on February 10, 2005."

California does not argue otherwise.[2] The first question we must address, then, is whether Banjo's successive petition in the superior court meets the requirements of *King*, such that the interval between the denial of Banjo's first petition and the filing of his second in the Los Angeles County Superior Court is tolled.

The parties dispute both whether Banjo's successive petition started a "new round" and whether the successive petition is timely. Because we conclude that Banjo's petition is not timely under the second prong of *King*, we need not determine whether the petition was a continuation of the first or the start of a second round.

The second part of the *King* analysis examines whether a successive petition was timely filed under state law. As discussed above, the standard for whether a petition was timely filed under California law is whether the petition was filed within a reasonable time.

Here, the superior court did not make a determination that Banjo's second petition was untimely. Rather, the court—treating the second petition as a motion for a new trial—found that the new evidence could with reasonable diligence have been discovered earlier, and thus denied relief. California law provides that a new trial may be

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[2] California does quibble that the time between the denial of Banjo's first petition and the filing of his motion for reconsideration should not be tolled. In light of our holding that Banjo's 146-day delay was not reasonable, and that Banjo's time for filing a federal petition would have elapsed during this period, we do not address the earlier seven-day delay.

granted on the basis of new evidence, unless that evidence could have been found prior to trial in the exercise of reasonable diligence. Cal. Penal Code § 1181(8); *People v. Martinez,* 685 P.2d 1203, 1205 (Cal. 1984). Thus, while the superior court rejected the petition, it did not explicitly reject it as untimely filed. *See Artuz v. Bennett,* 531 U.S. 4, 10-11 (2000) (distinguishing between timeliness, which is a condition to filing, and procedural bars, which are conditions to relief); *but cf. Saffold v. Newland*, 250 F.3d 1262, 1266-67 (9th Cir. 2000) (assuming that a California habeas petition denied "for lack of diligence" was a dismissal for untimeliness), *overruled on other grounds by Saffold*, 536 U.S. 214.

[7] The state court's failure to explicitly decide whether a petition was untimely filed does not end our analysis. *Chavis,* 546 U.S. at 194, 197; *Saffold,* 536 U.S. at 225-26. We must instead engage in an inquiry as to whether California courts would have deemed the petition filed within a reasonable time. *Chavis,* 546 U.S. at 198. Here, they plainly would not have.

[8] The Supreme Court has previously opined that California courts would not consider an unjustified and unexplained six-month delay "reasonable." *Id.* at 201. Further, the Court has permitted interval tolling under California's unusual system of habeas petitions and imprecise time limits on the assumption "that California's 'reasonable time' standard would not lead to filing delays substantially longer than those in States with determinate timeliness rules." *Id.* at 199-200 (citing *Saffold*, 536 U.S. at 222-23). *Chavis* presumed a 30- or 60-day delay would be the norm in most states, 546 U.S. at 193, 201; *Saffold* only 30 to 45 days, 536 U.S. at 222. Banjo waited 146 days. We

cannot conclude that such a delay is reasonable, nor is it consistent with the short periods of time permitted by most states and envisioned by the Supreme Court in reaching its decisions in *Saffold* and *Chavis*.

[9] Banjo counters that the California Supreme Court has held that a successive habeas petition will be considered on the merits if the prisoner explains and justifies the failure to present the claims in a timely manner as part of a prior petition. *In re Clark*, 855 P.2d 729, 745 (Cal. 1993). He contends that he met this standard, because he was continuing to develop evidence that would support a claim that was initially rejected for lack of evidence. But California law requires that, in "assessing a petitioner's explanation and justification for delayed presentations of claims," a court "consider whether the facts on which the claim is based, although only recently discovered, could and should have been discovered earlier. A petitioner will be expected to demonstrate due diligence in pursuing potential claims." *Id.* at 745.

[10] In rejecting Banjo's second habeas petition, the superior court found that Banjo's newly discovered evidence "could have been and should have been discovered and produced" earlier; indeed, it cites the same general section of *In re Clark*. If the evidence sought during the nearly five-month delay between the denial of the first petition and the filing of the second was evidence that should have been discovered earlier in the exercise of due diligence, the delay cannot be deemed justifiable. A California court would not have found this delay reasonable.

[11] We hold that Banjo's filing of his successive petition was not timely.

C

[12] Banjo alternatively argues that the period between the denial of his first petition and his filing of an original petition in the California Court of Appeal, as contemplated under state law, was not an unreasonable delay. The first superior court petition was denied on February 10, 2005, and the petition to the Court of Appeal was filed more than seven months later, on September 29, 2005. If the delay between the filing of the first and second superior court petitions was not reasonable, this even longer period cannot be either. We hold that the petition to the California Court of Appeal was not timely filed.

IV

[13] At the time the first habeas petition was denied by the superior court, Banjo had only fifteen days remaining of his one-year time limit to file a federal habeas petition. Because he did not timely file either the second petition with the superior court or the petition in the Court of Appeal, his petition was not "pending," and he is not entitled to interval tolling. The statute of limitation thus ran on February 25, 2005, well before Banjo filed his federal petition. The district court did not err in dismissing the petition as untimely.

AFFIRMED.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED AUGUST 12, 2008

No. CV 07-2142-GHK (RC)

DEL BANJO,

v.

ROBERT L. AYERS, JR.

August 12, 2008

George H. King, U.S. District Judge.

ORDER ADOPTING REPORT AND RECOMMENDATION

I. Introduction

This matter is before the Court on Magistrate Judge Rosalyn M. Chapman's Report and Recommendation ("R&R") regarding Petitioner Del Banjo's ("Petitioner") petition for habeas corpus. On April 2, 2007, Petitioner filed the instant petition for habeas corpus. On June 27, 2007, Respondent Robert L. Ayers, Jr. ("Respondent") filed a motion to dismiss this action. On September 27, 2007, Judge Chapman issued her R&R on this motion. Pursuant to 28 U.S.C. § 636, we have reviewed the entire case file *de novo*, including the R&R and Petitioner's objections filed on December 11, 2007.

A. Prior Proceedings and Factual Background

On July 13, 2000, in the Los Angeles County Superior Court (case no. BA198122), Petitioner was convicted by a jury of one count of kidnapping with intent to commit rape and/or sodomy in violation of Cal. Penal Code § 208(d), and one count of sodomy in violation of Cal. Penal Code § 286(c). On January 8, 2001, Petitioner was sentenced to a term of twenty-five years to life in state prison. Petitioner appealed his judgment of conviction to the California Court of Appeal, which affirmed the judgment. On September 9, 2002, Petitioner, proceeding through counsel, filed a petition for review in the California Supreme Court, which denied review on October 16, 2002.

On December 30, 2003, Petitioner filed a petition ("First Superior Court Petition") for writ of habeas corpus in the superior court requesting relief on three grounds: (1) false testimony was introduced against Petitioner; (2) the prosecution violated the Due Process Clause of the Fourteenth Amendment by using perjured testimony in securing Petitioner's conviction; and (3) ineffective assistance of counsel.

As to the first ground, Petitioner had argued that he was not guilty of raping the victim, but had instead engaged in consensual sex with the victim, who he argued was a prostitute. Petitioner argued that the victim committed perjury when she testified that she was not in fact a prostitute. As to the second ground, Petitioner argued that the prosecution knew that the victim was a prostitute, but allowed the victim to testify to the contrary and used such evidence to convict the Petitioner. Finally, as to the third ground, Petitioner argued that his trial counsel had failed to properly investigate evidence that would

have allowed Petitioner to prove that the victim was a prostitute.

In support of his claim that the victim was in fact a prostitute, Petitioner introduced a single witness, Salvatore Guletta ("Guletta"), who had been the manager of the apartment where the victim had lived at the time. After holding an evidentiary hearing on November 12, 2004, the superior court denied the First Superior Court Petition on January 28, 2005, citing the fact that it did not find Guletta credible as a witness. On February 4, 2005, Petitioner filed a motion for reconsideration, which the superior court denied on February 10, 2005.

On July 6, 2005, Petitioner filed a second petition ("Second Superior Court Petition") for writ of habeas corpus in the superior court, bringing the same three claims as those in the First Superior Court Petition, but with declarations from three additional witnesses purporting to corroborate Petitioner's claim that the victim was a prostitute. The superior court denied the petition on July 27, 2005, finding that because all three witnesses were located in the Southern California area at all relevant times, Petitioner should have presented them in the First Superior Court Petition.

On September 29, 2005, Petitioner filed a petition for writ of habeas corpus in the California Court of Appeal ("CCA Petition"), which was denied on April 11, 2006. On May 18, 2006, Petitioner filed a petition for writ of habeas corpus in the California Supreme Court ("CSC Petition"), which denied the petition on March 21, 2007. Petitioner filed the instant petition on April 2, 2007 under 28 U.S.C. § 2254.

II. Analysis

A. Statute of Limitations

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a one-year statute of limitations upon a state prisoner seeking federal habeas review of his or her underlying conviction and sentence. 28 U.S.C. § 2244(d)(1). AEDPA's one-year statute of limitations begins to run from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* § 2244(d)(1)(A).

As discussed above, Petitioner was convicted on July 13, 2000, and the California Supreme Court denied review on October 16, 2002. Where, as here, a petitioner does not seek certiorari in the United States Supreme Court, the direct review process is over at the end of the ninety-day period during which Petitioner could have sought certiorari, and the judgment is final for the purposes of AEDPA's statute of limitations. *See Whalem/Hunt v. Early*, 233 F.3d 1146, 1147 (9th Cir. 2000) (en banc). Thus, the statute of limitations began to run in this case on January 15, 2003, and expired on January 14, 2004. Petitioner did not file the instant petition until April 2, 2007, over three years after the statute of limitations had run. Therefore, the pending petition is time-barred unless Petitioner is entitled to statutory tolling.

B. Statutory Tolling[1]

AEDPA's tolling provision states that "the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2). Here, AEDPA's statute of limitations began running on January 15, 2003, the date the California Supreme Court's denial of direct review became final. Petitioner did not file the First Superior Court Petition until December 30, 2003, 350 days after the statute of limitations began running. There is no doubt that statutory tolling began the date the First Superior Court Petition was filed, but only 15 days of the statute of limitations remained for Petitioner to file his petition for federal habeas review. It is clear that the statute of limitations was tolled from the filing of the First Superior Court Petition until the motion for reconsideration was denied on February 10, 2005. It is the extent of any tolling subsequent to February 10, 2005 that we must resolve here. That question turns on whether Petitioner's state habeas review was still "pending" after February 10, 2005. In *Carey v. Saffold*, 536 U.S. 214, 221 (2002), the United States Supreme Court addressed the definition of "pending" in the context of California's unique "original writ" system of state habeas review. The Court held that an application is "pending," and the statute of limitations thus tolled, until it "has achieved final resolution through the State's post-

[1] Petitioner does not argue that he is entitled to equitable tolling. Thus, we will not consider whether he is entitled to such tolling.

conviction procedures." *Id.* at 220. The Court stated that "California's collateral review system differs from that of other States in that it does not require, technically speaking, appellate review of a lower court determination." *Id.* The Court also noted that California "determines the timeliness of each filing according to a 'reasonableness' standard," rather than the usual 30 or 45 days required for filing a notice of appeal in "appeal" states. *Id.* However, the Court concluded that "California's system functions in ways sufficiently like other state systems of collateral review to bring *intervals between a lower court decision and a filing of a new petition in a higher court* within the scope of the statutory word 'pending.'" *Id.* at 223 (emphasis added).

1. The Second Superior Court Petition Began a Second Round of Review

Saffold suggests that a state habeas petition is only pending insofar as a petitioner proceeds to a higher state court. Here, however, Petitioner filed an additional petition in the superior court before proceeding to the court of appeals. The Ninth Circuit has stated that "in the absence of undue delay," *Delhomme v. Ramirez*, 340 F.3d 817, 819 (9th Cir. 2003) (quoting *Biggs v. Duncan*, 339 F.3d 1045, 1048 (9th Cir. 2003)), California state prisoners filing for federal habeas review are "entitled to 'one full round' of collateral review in state court free from federal interference." *Welch v. Carey*, 350 F.3d 1079, 1982 (9th Cir. 2003) (quoting *Saffold*, 536 U.S. at 220); *see also Delhomme*, 340 F.3d at 819. However, the Ninth Circuit has defined "one full round" as "includ[ing] the interval between the disposition of a post-conviction habeas petition and the filing of an appeal or habeas petition at the *next state appellate level*."

Delhomme, 340 F.3d at 819 (emphasis added). Petitioner's filing of his Second Superior Court Petition on July 6, 2005 therefore appears to conflict with what the Ninth Circuit and the United States Supreme Court have set forth as "one full round." The Ninth Circuit cases proscribe tolling for intervals between state habeas petitions filed at the same level. *See Biggs*, 339 F.3d at 1048 (finding that a petitioner "kicked off a new round of collateral review" and thus was not entitled to statutory tolling between the first and second round because "[h]e was no longer pursuing his application for habeas relief *up the ladder* of the state court system" (emphasis added)). As Petitioner was not pursuing habeas relief "up the ladder of the state court system" in filing his Second Superior Court Petition, *Biggs* requires that we view the Second Superior Court Petition as starting a new round of review. As such, statutory tolling expired on February 10, 2005, and Petitioner's application for federal habeas review must be denied as untimely.

2. The Second Superior Court Petition was Improper

We also conclude that the Second Superior Court Petition was procedurally improper under both federal and California law. Petitioner argues that the *King* exception, elucidated in *King v. Roe*, 340 F.3d

821, 823 (9th Cir. 2003), applies here. We disagree.[2] We also question whether the Second Superior Court Petition was proper under California law in light of

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[2] In *King*, the Ninth Circuit denied tolling for the period during which subsequent state habeas petitions were pending, because "[t]hey made no attempt to correct [the] prior petition, and therefore were not offered simply to remediate deficiencies." *Id.* Generally, courts have narrowly interpreted *King*, construing "deficiencies" to mean that the initial petition was dismissed without prejudice for failure to allege with sufficient particularity facts warranting habeas relief and allowing amendment to comply. *See Hemmerle v. Arizona*, 495 F.3d 1069, 1076 (9th Cir. 2007) (reasoning that "interval tolling, as defined by *King*, will often involve an incomplete or insufficient first petition"); *Gaston v. Palmer*, 417 F.3d 1030 (9th Cir. 2005), rehearing granted and opn. amended, 447 F.3d 1165 (9th Cir. 2006) (court noted that petitioner was "permitted to file another application in which the procedural deficiency was corrected"); *Evans v. Adams*, 423 F. Supp. 2d 1087, 1091 (C.D. Cal. 2006) (petitioner was not entitled to tolling for the period between a supreme court petition and subsequent superior court petition because the first petition was denied on the merits); *Gillie v. Yates*, 417 F. Supp. 2d 1134, 1137 (C.D. Cal. 2006) (petitioner was not entitled to tolling for the period after the Supreme Court denied his habeas petition because it was denied on the merits). Petitioner argues that the *King* exception should apply because the Second Superior Court Petition is limited to an elaboration of the facts of the claims brought in the First Superior Court Petition, and that the *King* exception extends to situations, like his, involving first petitions that are denied on the merits. We disagree. We read the *King* exception as providing petitioners an opportunity to cure procedural deficiencies, not to get a second bite at the apple. Moreover, such a reading would be contrary to AEDPA's stated purpose of promoting the finality of state court judgments. *See Saffold*, 536 U.S. at 220. Were we to accept Petitioner's argument that the *King* exception applies to these facts, we would be sanctioning piecemeal presentation of petitions that could indefinitely extend statutory tolling.

In re Chessman, 43 Cal.2d 408, 408 (1954) ("*Chessman*") and *In re De La Roi*, 28 Cal.2d 264, 269 (1946) ("*De La Roi*").[3] Further, irrespective of our reading of *King*, *De La Roi*, and *Chessman*, the state courts found that the Second Superior Court Petition was unreasonably delayed due to Petitioner's lack of diligence.

In his decision on the Second Superior Court Petition, Judge Michael Johnson stated that, "[t]he Second Petition relies upon declaration by people who live in the Southern California area and have been

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[3] In both *De La Roi* and *Chessman*, the California Supreme Court addressed the filing of successive habeas petitions. In both cases, the California Supreme Court rejected such filings, finding that there was not a sufficient change in the facts or law to justify the successive petitions. *See Chessman*, 43 Cal.2d at 408; *De La Roi*, 28 Cal.2d at 275. In deciding both cases, the California Supreme Court identified a distinction between evidentiary facts and ultimate facts, finding that a change in ultimate facts was required before allowing a successive habeas petition to be brought. *Chessman*, 43 Cal.2d at 408; *De La Roi*, 28 Cal. 2d at 274. Here, in bringing his Second Superior Court Petition, Petitioner brought forth three new witnesses who purported to corroborate his allegation that the victim was a prostitute. In light of *De La Roi* and *Chessman*, we doubt that the California Supreme Court would have considered these witnesses' testimony as constituting an ultimate fact. Even were we to credit Petitioner's new witnesses, evidence that the victim was a prostitute would not have necessarily established Petitioner's innocence. Petitioner contends that in *In re Martin*, 44 Cal.3d 1 (1987) ("*Martin*"), the California Supreme Court shifted away from the distinction between evidentiary facts and ultimate facts, instead requiring only "new facts . . . supported by exhibits of recent date." 44 Cal.3d at 27 n.3. Although we are doubtful that *Martin* overruled *De La Roi* or *Chessman* by this footnote, which does not explicitly mention either decision, we need not decide that question here.

available for investigation, interview and testimony at all relevant times. These are matters that could have been and should have been presented during the extensive proceedings on the first habeas petition. . . .[W]ith reasonable diligence petitioner's current declarations could have been and should have been discovered and produced during the first habeas proceeding." (Cal. Super. Ct. Order, 7/27/2005; citations omitted.) We construe these statements as the superior court's finding that the Second Superior Court Petition was improper in light of Petitioner's lack of diligence. Thereafter, both the California Supreme Court (Cal. S.Ct. Order, 3/21/2007) and the California Court of Appeals (CCA Order, 4/11/2006) denied Petitioner's subsequent habeas filings without comment. The United States Supreme Court has stated that state court determinations of whether a petition is filed in a "reasonable time" are determinative. *See Saffold*, 536 U.S. at 226 ("If the California Supreme Court had clearly ruled that Saffold's 4 1/2-month delay was 'unreasonable,' that would be the end of the matter . . . ."); *Chavis*, 546 U.S. at 198 (A federal court must decide whether a request was filed in a reasonable time "[i]n the absence of . . . clear indication that a particular request for appellate review was timely or untimely . . . .").[4]

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[4] Here, in the absence of a reasoned opinion from either the California Supreme Court or the California Court of Appeal, we "look through" these unreasoned denials, and deem the views expressed by the superior court in its denial of the Second Superior Court Petition to be those of the California state courts. *See Ylst v. Nunnemaker*, 501 U.S. 797, 804–06 (1991).

3. Petitioner Unreasonably Delayed Filing the CCA Petition

Irrespective of the foregoing, we have also considered whether the time between the First Superior Court Petition and CCA Petition is amenable to tolling, without regard to the Second Superior Court Petition. California's unique status as an "original writ," as opposed to an "appeal," state may allow us to view the CCA Petition as part of the "first round" started by the First Superior Court Petition. The "original writ" system of collateral review allows a petitioner to file original petitions for review at any level of the state court system. *See Saffold*, 536 U.S. at 221. "By definition, an original petition does not require that a petitioner raise the same claims that he may have raised below . . . ." *Welch v. Newland*, 267 F.3d 1013, 1017-18 (9th Cir. 2001); *see also Biggs*, 339 F.3d at 1048. Because subsequent petitions may contain completely different claims, and because a state habeas petitioner files anew at each level, rather than appealing a specific decision of the lower court, it may be appropriate to treat the CCA petition as being part of the first round started by the First Superior Court Petition, rather than treating it as part of a second round started by the Second Superior Court Petition.

Even if we put aside the Second Superior Court Petition, and treat the CCA petition as part of the first round, the relevant interval lies between the California Superior Court's February 10, 2005 denial of the motion for reconsideration and the September 29, 2005 filing of the CCA petition. This is a gap of 230 days. Petitioner must explain this delay, as "only a *timely* appeal tolls AEDPA's 1-year limitations period for the time between the lower court's adverse

decision and the filing of a notice of appeal in the higher court. . . ." *Evans v. Chavis*, 546 U.S. 189, 197 (2006) (emphasis in original). A state petition is timely only if it is filed within a "reasonable time." *Saffold*, 536 U.S. at 221; *Chavis*, 546 U.S. at 191 (citing *In re Harris*, 5 Cal.4th 813, 828 n.7 (1993)). In *Chavis*, the Supreme Court held that "[in] the absence of (1) clear direction or explanation from the California Supreme Court about the meaning of the term 'reasonable time' . . . or (2) clear indication that a particular request for appellate review was timely or untimely . . . the federal court must decide whether the filing of the request for state-court appellate review (in state collateral review proceedings) was made within what California would consider a 'reasonable time.'" *Chavis*, 546 U.S. at 198.

In *Chavis*, the Supreme Court reviewed a Ninth Circuit ruling that a three year and one month interval between the denial of a state prisoner's California Court of Appeal habeas petition and the filing of his California Supreme Court habeas petition was "pending" and thus tolled under § 2244(d)(2). *Id.* at 200-01. The petitioner in *Chavis* attempted to explain the delay by arguing that he was unable to work in the prison law library because either his prison job's hours prevented him from doing so or because prison lockdowns kept him in his cell. *Id.* at 200. However, the Court found that, "viewing every disputed issue most favorably to Chavis, there remains a totally unexplained, hence unjustified, delay of at least six months. *Id.* at 201. The Court went on to state that "[s]ix months is far longer than the 'short period[s] of time,' 30 to 60 days, that most States provide for filing an appeal to the state supreme court." *Id.* (citing *Saffold*, *supra*, at 219).

Finally, the Court stated that "[w]e have found no authority suggesting, nor found any convincing reason to believe, that California would consider an unjustified or unexplained 6-month filing delay 'reasonable.' Nor do we see how an unexplained delay of this magnitude could fall within the scope of the federal statutory word 'pending' as interpreted in *Saffold*." *Id.*

Having reviewed the record available to the Court, we find that Petitioner lacks sufficient justification for a delay of 230 days. Petitioner's counsel questioned Guletta, the witness deemed not credible by the superior court in the First Superior Court Petition, in early March 2005 to determine if more witnesses could be ascertained. After an extended investigation of the information supplied by Guletta, Petitioner produced the three additional witnesses whose declarations were included in the Second Superior Court Petition, the last of whom's declaration was executed on May 19, 2005. The private investigator's declaration was executed on June 23, 2005. After rejection of the Second Superior Court Petition, Petitioner filed the CCA Petition on September 29, 2005.

Although it appears that Petitioner's counsel diligently undertook the investigation that led to the discovery of the three additional witnesses *after* the motion for reconsideration of the First Superior Court Petition was denied, there is no reason that Petitioner's counsel could not have been diligent *before* the First Superior Court Petition was denied. It was Guletta's information that led to the discovery of the three new witnesses. Guletta was known as a witness well before the First Superior Court Petition was ever filed. In fact, Guletta's declaration attached

to the First Superior Court Petition was executed on October 3, 2002, three and a half months before AEDPA's statute of limitations began to run and over two years before the investigation leading to the new witnesses began. There is no reason why a diligent investigation of the same order as the one that led to the three new witnesses could not have begun before the motion for reconsideration was denied. Therefore, we cannot say that the delay in filing the CCA petition was justified. The interval of 230 days remains unjustified and insufficiently explained, and therefore statutory tolling does not apply to this delay. *See Chavis*, 546 U.S. at 201. This conclusion is bolstered by the summary denial of the petitions filed in the California Court of Appeal and California Supreme Court.[5]

Even if we were to afford Petitioner the benefit of tolling of this additional investigative time, there is

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[5] As we stated above, our view of whether Petitioner filed the CCA Petition within a "reasonable time" must consider whether a California state court would have found the interval to be reasonable. *See Chavis*, 546 U.S. at 198 (a "federal court must decide whether the filing of the [habeas petition] . . . was made within what California would consider a 'reasonable time.'"). Insofar as we "look through" the unreasoned denials of the California Court of Appeal and California Supreme Court, the only commentary on the reasonableness of Petitioner's investigatory time comes in the denial of the Second Superior Court Petition. As discussed in section II.B.2., *supra*, that superior court stated that "with reasonable diligence Petitioner's current declarations could have been and should have been discovered and produced during the first habeas proceeding." (Cal. Super. Ct. Order, 7/27/2005.) We construe this as evidence that the California state courts found unreasonable the delay between the resolution of the First Superior Court Petition and the filing of the CCA Petition.

still an unjustified delay of more than three months, from June 23, 2005, when the last declaration was signed, until September 29, 2005.[6] This 98-day delay falls significantly beyond the 30 to 60 days cited in *Chavis*, 546 U.S. at 201 and *Saffold*, 536 U.S. at 219. The Ninth Circuit has not set forth a standard for determining what period of time constitutes substantial delay, nor has it set forth a standard for determining what factors justify any length of delay. *See King v. Lamarque*, 464 F.3d 963, 966 (9th Cir. 2006). However, even accepting the additional time for Petitioner to investigate, many district courts have found unexplained delays even shorter than 98 days to be unreasonable. *See, e.g.*, *Henry Ngo Wu v. Curry*, 2008 WL 2441401, *5 (N.D. Cal. June 13, 2008); *Livermore v. Watson*, 2008 WL 802330, *4 (E.D. Cal. Mar. 26, 2008) (finding unjustified 78-day delay unreasonable; *Hunt v. Feller*, 2008 WL 364995, *3 (E.D. Cal. Feb. 8, 2008) (finding unjustified 70-day delay unreasonable); *Young v. Hickman*, 2008 WL 361011, *3 (E.D. Cal. Feb. 8, 2008) (finding unjustified 95-day delay unreasonable); *Culver v. Director of Corrections*, 450 F. Supp. 2d 1135, 1140-41 (C.D. Cal. 2006) (finding unjustified 97- and 71-day delays unreasonable).

For all these reasons, we find and conclude that Petitioner's federal petition for writ of habeas corpus is untimely.

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[6] Because this analysis presupposes an upward progression from the First Superior Court Petition, and because we conclude that the Second Superior Court Petition was not justified, we do not view the interval while the Second Superior Court Petition was pending as an explained or justified delay.

VI. Conclusion

In sum, we adopt the magistrate judge's R&R to the extent that it is consistent with this Order. In accordance with the magistrate judge's R&R and this Order, we hereby DISMISS as untimely Petitioner's petition for writ of habeas corpus.

IT IS SO ORDERED.

ORDER GRANTING IN PART PETITIONER'S APPLICATION FOR CERTIFICATE OF APPEALABILITY OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED OCTOBER 1, 2008

No. CV 07-2142-GHK (RC)

DEL BANJO,

v.

ROBERT L. AYERS, JR.

October 1, 2008

ORDER GRANTING IN PART PETITIONER'S APPLICATION FOR CERTIFICATE OF APPEALABILITY

On September 9, 2008, petitioner filed a timely Notice of Appeal from the Judgment entered herein on August 13, 2008. On September 15, 2008, petitioner filed an application for a Certificate of Appealability ("COA").

Under 28 U.S.C. § 2253(c)(2), a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." Here, the Court has adopted the Magistrate Judge's finding and conclusion that the original Petition was untimely under 28 U.S.C. § 2244(d). Thus, the Court's determination of whether a COA should issue here is governed by the Supreme Court's decision in Slack v.

McDaniel, 529 U.S. 473 (2000), where the Supreme Court held that, "[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 484.

Here, it appears to the Court that petitioner has made the requisite showing that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling," and specifically that petitioner has made the requisite showing with respect to the following issue: whether petitioner is entitled to statutory tolling under any of the theories advanced in the petition.

Thus, it appears to the Court that the issuance of the COA turns on the second step of the two-step Slack analysis. The Ninth Circuit has held that the Court's task in completing the second step is "simply [to] take a 'quick look' at the face of the complaint to determine whether the petitioner has 'facially allege[d] the denial of a constitutional right.'" Lambright v. Stewart, 220 F.3d 1022, 1026 (9th Cir. 2000)(citations omitted). The Court finds that petitioner has facially alleged the denial of a constitutional right in the Petition herein.

Accordingly, petitioner's application for a COA is GRANTED with respect to the one issue identified above. The Court declines to issue a COA with respect to any of petitioner's substantive claims,

because the Court's dismissal on procedural grounds rendered it unnecessary for the Court to consider the merits of any of those claims.

Dated: 10/1/08

GEORGE H. KING
United States District Judge

FINAL ORDER ON PETITION FOR HABEAS CORPUS OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES DATED JANUARY 28, 2005

No. B198122

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

DEL BANJO,

Defendant.

January 28, 2005

FINAL ORDER ON PETITION FOR HABEAS CORPUS

The parties filed extensive briefs and exhibits between December 30, 2003 and August 24, 2004 concerning the petition for habeas corpus by defendant/petitioner Del Banjo. An evidentiary hearing was held on November 12, 2004, at which there was testimony by Salvatore Guletta, Ezekiel Perlo and Steven Katz. The parties filed post-hearing briefs on January 21, 2005. All of these have been reviewed, as well as many portions of the trial record.

Petitioner contends he is entitled to habeas relief under Penal Code § 1473 because the complaining witness Nanna Skov testified falsely at trial. He contends this is supported directly by the testimony of Salvatore Guletta. Petitioner has the burden of

proving his contentions by a preponderance of the evidence. In re Alvernaz (1992) 2 Cal. 4th 924, 945. For the reasons explained below, petitioner has not met this burden and the petition is denied.

This order is based upon one central ground: I did not believe Salvatore Guletta and have no confidence in him or his testimony.

I found Guletta's demeanor during the November 12 hearing to be more suspicious than straightforward. He did not answer questions in a manner that was candid or forthcoming; he inspired no confidence.

As a matter of content, Guletta's testimony was hardly rich with detail. Guletta's account of his dealings with Skov and others involved in the case was superficial and spotty.

The obvious question about Guletta going into the November hearing was why he had waited so long to come forward with his recent statements about Skov. Guletta was first contacted by investigators in May 2000, the trial was conducted in summer 2000, and petitioner was sentenced in January 2001. But Guletta did not provide any definitive information about Skov until he signed his declaration on October 3, 2002. A full explanation of this extraordinary delay was certainly in order at the hearing, but it was never provided. Thus:

- Based on earlier interviews, petitioner alleged that Guletta was reluctant to talk about Skov's activities because he feared "repercussions" from her black friends. [Pet. at 21] At the hearing Guletta said the "repercussions" had nothing to do with Skov's friends, but concerned his business dealings with Mark Teitler. [TR at 27-28]

• Neither the extent nor the importance of those business dealings was explained. Guletta testified that he worked as a videographer in Teitler's production of pornographic movies [TR at 8], and (without bothering to explain exactly why) he felt that providing negative information about Skov could jeopardize his work and relationship with Teitler. [TR at 25]

• But at the same time, Guletta testified that he only worked with Teitler "sometimes" [TR at 27] and "every once in awhile" [TR at 32], with most of their work together in 1997 [TR at 32]. Guletta in fact testified that he had last seen Teitler in 1997. [TR at 25] This hardly seems like the kind of relationship that would stop an honest man from telling the truth, and in any event their relationship appears to have petered out well before this case came to trial.

During his testimony Guletta tried to give the impression that he felt strongly about prostitution – to the point that he threw Skov and Andersen out of his apartment [TR at 12], threatened to call Skov's mother and reveal her daughter's illicit activities [TR at 19], and lectured Skov that she could only blame herself for her sexual assault [TR at 17]. This strong conviction seems completely at odds with someone who waited two and one-half years to sign a declaration stating that Skov was working in the very same trade of which he claims to so strongly disapprove.

Finally, Guletta's testimony described a troubled and combative relationship with Skov. He said that she ran up a large phone bill that she never repaid [TR at 16], she did not return a stereo that he loaned her [TR at 16], she threatened to harm him if he

called her mother [TR at 18], and she punched him in the nose when he told her that she could only blame herself for getting raped [TR at 17]. All of this suggests a bias or dislike that colors Guletta's views about Skov.

The bottom line is that that I do not believe Guletta, and do not accept his testimony. There is no reason to address the parties' other contentions. The petition for habeas corpus is denied, and petitioner will be returned to the custody of the Department of Corrections to serve the term to which he was sentenced on January 8, 2001.

Dated: January 28, 2005

Michael M. Johnson
Superior Court Judge

ORDER DENYING SECOND PETITION FOR HABEAS CORPUS OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES DATED JULY 27, 2005

No. B198122

PEOPLE OF THE STATE OF CALIFORNIA

v.

DEL BANJO

July 27, 2005

Michael Johnson, Superior Court Judge.

MINUTE ORDER

The Court has reviewed the second petition for habeas corpus filed by Defendant/Petitioner Del Banjo on July 6, 2005.

Petitioner's first habeas petition was filed on December 30, 2003 and was followed by Respondent's informal response filed on April 6, 2004, Petitioner's reply filed on May 17, 2004, the Court's Order to Show Cause issued on June 3, 2004, and a pre-hearing conference held on August 24, 2004. An evidentiary hearing was conducted on November 12, 2004, at which Petitioner called witnesses and was given fa [sic] full opportunity to present any an [sic] all evidence relevant to his claims. The parties filed post-hearing briefs on January 21, 2005.

At a hearing on January 28, 2005, the Court issued a tentative written order, heard argument, and made the tentative order final for reasons that were explained in some detail. As explained in the order and the Court's oral remarks, the petition was denied because of the Court's disbelief and distrust of the testimony presented by Petitioner. Petitioner later filed a motion for reconsideration, which was denied on February 9, 2005.

The second petition relies upon declaration [sic] by people who live in the Southern California area and have been available for investigation, interview and testimony at all relevant times. These are matters that could have been and should have been presented during the extensive proceedings on the first habeas petition. Penal Code Section 1475; In re Clark (1993) 5 Cal. 4th 750, 767; see In re Hochberg (1970) 2 Cal. 3d 870, 876.

The second petition is essentially a motion for new trial based upon newly discovered evidence. See Penal Code Section 1181(8). But with reasonable diligence Petitioner's current declarations could have been and should have been discovered and produced during the first habeas proceeding. People v. Miller (1951) 37 Cal. 2d 801, 807; People v. Trujillo (1977) 67 Cal. App. 3d 547, 556. A motion for new trial is subject to the Court's reasonable discretion. People v. Turner (1994) 8 Cal. 4th 137, 212. In light of the decidedly negative views this Court has expressed about Petitioner's evidence at the November habeas hearing, the Curt [sic] will not exercise its discretion to order a new trial.

The second petition for habeas corpus is denied.

ORDER OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION EIGHT DATED APRIL 11, 2006

No. B186177

IN RE

DEL BANJO

ON HABEAS CORPUS.

April 11, 2006

ORDER

THE COURT*:

We have read and considered the petition for writ of habeas corpus filed on September 29, 2005, and petitioner's letter filed on March 30, 2006. The petition is denied.

* Cooper, P.J. Rubin, J. Boland, J.

ORDER OF THE SUPREME COURT OF CALIFORNIA DATED MARCH 21, 2007

No. S143552

IN RE DEL BANJO ON HABEAS CORPUS

March 21, 2007

ORDER

The petition for writ of habeas corpus is DENIED.

George
Chief Justice

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED JUNE 17, 2010

No. 08-56512

DEL BANJO,

Petitioner-Appellant,

v.

ROBERT L. AYERS, JR., WARDEN, SAN QUENTIN PRISON,

Respondent-Appellee.

June 17, 2010

ORDER

Before: O'SCANNLAIN and TALLMAN, Circuit Judges, and BLOCK, United States District Judge.*

This appeal was argued and submitted on May 6, 2010, in Pasadena, California. Petitioner moved to defer submission of the case or to delay issuance of the court's decision until after July 26, 2010. The motion was unopposed. Because the opinion is filed contemporaneously herewith, the motion is denied. However, we grant Petitioner similar relief by extending the deadline to file any Petition for Rehearing or Petition for Rehearing En Banc to August 23, 2010.

SO ORDERED.

* The Honorable Frederic Block, Senior United States District Judge for the Eastern District of New York, sitting by designation.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED SEPTEMBER 15, 2010

No. 08-56512

DEL BANJO,

Petitioner-Appellant,

v.

ROBERT L. AYERS, JR., WARDEN, SAN QUENTIN PRISON,

Respondent-Appellee.

September 15, 2010

ORDER

Before: O'SCANNLAIN and TALLMAN, Circuit Judges, and BLOCK, Senior District Judge.*

The panel has voted to deny the petition for panel rehearing; Judges O'Scannlain and Tallman have voted to deny the petition for rehearing en banc, and Judge Block so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

* The Honorable Frederic Block, Senior United States District Judge for the Eastern District of New York, sitting by designation.